FILED
JUL 31 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

(3)

No. 05-1508

In the Supreme Court of the United States

ZUNI PUBLIC SCHOOL DISTRICT NO. 89, ET AL.,
PETITIONERS

v.

DEPARTMENT OF EDUCATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

PAUL D. CLEMENT
Solicitor General
Counsel of Record

PETER D. KEISLER
Assistant Attorney General

ROBERT S. GREENSPAN
MICHAEL E. ROBINSON
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

The federal Impact Aid statute, 20 U.S.C. 7701 *et seq.*, provides funds to local school districts that have a substantial federal presence within the district. The Impact Aid program generally prohibits a State from considering federal impact aid received by local school districts when allocating state funds among school districts in the State. 20 U.S.C. 7709(a). If, however, the Secretary of Education certifies that the State's funding system is "equalize[d]" within the meaning of the statute, 20 U.S.C. 7709(b) (2000 & Supp. III 2003), the State may consider federal impact aid funds received by a school district when allocating state funds among school districts. The question presented is as follows:

Whether the methodology used by the Secretary in determining whether a State's funding system is equalized is based on a permissible interpretation of the Impact Aid statute, 20 U.S.C. 7709(b) (2000 & Supp. III 2003).

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 2
Argument 8
Conclusion 15

TABLE OF AUTHORITIES

Cases:

Chevron U.S.A. Inc. v. *NRDC*, 467 U.S. 837 (1984) 7, 8, 9
Gonzales v. *Oregon*, 126 S. Ct. 904 (2006) 14
United States v. *Mead Corp.*, 533 U.S. 218 (2001) 9

Statutes and regulations:

20 U.S.C. 240(d)(2)(B) (Supp. IV 1974) 3
20 U.S.C. 3474 14
20 U.S.C. 7701 *et seq.* 2
20 U.S.C. 7701-7714 (2000 & Supp. III 2003) 2
20 U.S.C. 7709 ..... 8, 14
20 U.S.C. 7709(a) 2
20 U.S.C. 7709(b) 5
20 U.S.C. 7709(b)(1) (2000 & Supp. III 2003) 2
22 U.S.C. 7709(b)(2) 4
20 U.S.C. 7709(b)(2)(A) 5
20 U.S.C. 7709(b)(2)(B) 14
20 U.S.C. 7709(b)(2)(B)(i) ..... *passim*
20 U.S.C. 7709(c)(3)-(4) 14

Regulations—Continued: Page

34 C.F.R. Pt. 222, Subpt. K., App. (1993) 4, 5

34 C.F.R. 222.63 (1993) 4

34 C.F.R. 222.162 5

34 C.F.R. 222.162(a) (1996) 5

Miscellaneous:

41 Fed. Reg. (1976):

p. 26,320 3

p. 26,324 ..... 4, 13

p. 26,327 3

p. 26,329 3

H.R. Rep. No. 805, 93d Cong., 2d Sess. 2

In the Supreme Court of the United States

No. 05-1508

ZUNI PUBLIC SCHOOL DISTRICT NO. 89, ET AL.,
PETITIONERS

v.

DEPARTMENT OF EDUCATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

OPINIONS BELOW

The per curiam opinion of the court of appeals (Pet. App. 1a-2a) is reported at 437 F.3d 1289. The panel opinion of the court of appeals (Pet. App. 3a-33a) is reported at 393 F.3d 1158. The decision of the Secretary of Education (Pet. App. 34a-40a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 23, 2006. The petition for a writ of certiorari was filed on May 24, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioners, Zuni Public School District No. 89 (Zuni) and Gallup-McKinley County Public School District No. 1 (Gallup-McKinley), are two New Mexico local educational agencies (LEAs) that receive federal financial assistance under what is commonly known as the Impact Aid program. 20 U.S.C. 7701 *et seq.* The Impact Aid program provides assistance to local school districts in which the federal government's tax-exempt ownership of real property limits the property tax base, or to school districts obligated to serve pupils who live on federal property (including Indian lands) or whose parents work on federal property. See 20 U.S.C. 7701-7714 (2000 & Supp. III 2003).

To assure that LEAs adversely affected by a federal presence obtain the full intended benefit of impact aid funding, the impact aid statute generally bars a State from considering the federal impact funding an LEA receives when distributing state aid to school districts. 20 U.S.C. 7709(a). If, however, the Secretary certifies that a State has a program of aid "that equalizes expenditures for free public education among local educational agencies in the State," the State may consider impact aid when distributing state aid to its school districts. 20 U.S.C. 7709(b)(1) (2000 & Supp. III 2003). Congress recognized that, in the situation of a State with equalized education funding among LEAs, barring the State from considering impact aid to individual school districts would impair the ability of the State to equalize disparities in wealth among school districts. See H.R. Rep. No. 805, 93d Cong., 2d Sess. 42 (1974).

2. a. Initially, Congress left the task of determining whether a State operates an effective equalization pro-

gram almost entirely to the Secretary's discretion. See 20 U.S.C. 240(d)(2)(B) (Supp. IV 1974) (Pet. App. 70a). In 1976, after engaging in notice and comment rulemaking, the Secretary promulgated regulations providing that a State would be deemed "equalized" if the disparity in per-pupil revenues or expenditures among the State's LEAs was no more than 25%. See 41 Fed. Reg. 26,320, 26,327 (1976). The specific methodology the Secretary would follow in making a disparity determination was set forth in Appendix A to the regulation.

First, the Secretary ranked LEAs by per-pupil expenditures or revenues. Next, the Secretary identified those LEAs that fell "at the 95th and 5th percentiles of the total number of pupils in attendance in the schools" of the State's LEAs. 41 Fed. Reg. at 26,329 (Pet. App. 159a-160a). The per-pupil expenditures or revenues of those two LEAs were then compared to determine whether the disparity exceeded 25%. *Ibid.*; *id.* at 26,327. The effect of comparing those two LEAs was essentially to calculate the disparity among those LEAs whose pupils accounted for the central 90% of the overall pupil population along the spectrum of LEAs (as ranked by per-pupil expenditures or revenues), and correspondingly to exclude from consideration those LEAs whose pupil populations accounted for the 5% of the overall pupil population that lay at each end of the spectrum of LEAs.[1]

---

[1] Because the Secretary's methodology treats each LEA as an indivisible unit when determining which LEAs to exclude, the methodology would result in excluding those LEAs that account for *approximately* 5% of the pupil population at either end of the spectrum, rather than excluding exactly 5% of the pupil population at either end of the spectrum.

In the course of the notice and comment rulemaking process, the Secretary considered and rejected the suggestion that, instead of excluding those LEAs at either end of the spectrum whose pupils accounted for 5% of the total pupil population, the Secretary instead should exclude 5% of the *LEA*s at either end of the spectrum, regardless of the number of pupils served by those LEAs. The Secretary prescribed that the "percentiles will be determined on the basis of numbers of pupils and not on the basis of numbers of districts." 41 Fed. Reg. at 26,324. The Secretary explained:

> [I]t is the [Secretary's] view that basing an exclusion on numbers of districts would act to apply the disparity standard in an unfair and inconsistent manner among States. * * * In States with a small number of large districts, an exclusion based on percentage of school districts might exclude from the measure of disparity a substantial percentage of the pupil population in those States. Conversely, in States with large numbers of small districts, such an approach might exclude only an insignificant fraction of the pupil population and would not exclude anomalous characteristics.

Ibid. In 1993, the 1976 regulations were codified with essentially the same language at 34 C.F.R. 222.63 (1993) and 34 C.F.R. Pt. 222, Subpt. K, App. (1993).

b. Congress amended the Impact Aid statute in 1994, for the first time codifying statutory standards concerning the determination whether a State operates an equalized program. The statute, as amended, calls for the Secretary to continue to apply a 25% disparity test to those LEAs that remain after applying 95th and 5th percentile exclusions. See 20 U.S.C. 7709(b)(2). In

particular, the statute prescribes that state funding is "equalize[d]" if "the amount of per-pupil expenditures made by, or per-pupil revenues available to, the [LEA] in the State with the highest such per-pupil expenditures or revenues did not exceed the amount of such per-pupil expenditures made by, or per-pupil revenues available to, the [LEA] in the State with the lowest such expenditures or revenues by more than 25 percent." 20 U.S.C. 7709(b)(2)(A). The statute further prescribes that, in making that calculation, the Secretary shall "disregard [LEAs] with per-pupil expenditures or revenues above the 95th percentile or below the 5th percentile of such expenditures or revenues in the State." 20 U.S.C. 7709(b)(2)(B)(i). That language concerning the 95th and 5th percentiles varies slightly from the corresponding language that was in the appendix to the regulations at the time of the statutory amendment. See 34 C.F.R. Pt. 222, Subpt. K, App. (1993) (basing 25% calculation on the two LEAs that fall "at the 95th and 5th percentiles of the total number of pupils in attendance" in the State's LEAs).

After the 1994 amendments, the Secretary issued a new regulation that essentially mirrored the new statutory language. See 34 C.F.R. 222.162(a) (1996). In an appendix, the new regulation detailed the precise methodology for applying the disparity test, which retained the same methodology for implementing the 95th and 5th percentile exclusions that had been outlined in the previous appendix to the regulations.

3. For Fiscal Year 2000, the Assistant Secretary for Elementary and Secondary Education certified that the State of New Mexico operated an equalized program pursuant to 20 U.S.C. 7709(b) and the corresponding regulations at 34 C.F.R. 222.162. Pet. App. 41a-42a.

Petitioners contested the certification, and an administrative law judge issued a decision sustaining the Assistant Secretary's certification. *Id.* at 43a-58a.

Petitioners appealed the ALJ's decision to the Secretary, who affirmed the ALJ's decision. Pet. App. 34a-40a. The Secretary explained that, "[a]lthough the impact aid statute sets forth the parameters for calculating state public education or revenues under the disparity test, the statute does not contain a specific implementation of the disparity test." *Id.* at 37a. Congress instead had "left that gap to be filled by regulation, which has been duly promulgated at an appendix to Subpart K of 34 CFR Part 222." *Ibid.* The Secretary concluded that there "is nothing within the text of the statute that precludes [the regulatory] interpretation or *requires* another result." *Id.* at 39a.

4. Petitioners filed a petition for review in the court of appeals. Petitioner Zuni contended that the Secretary's methodology for determining which LEAs to exclude under the 95th and 5th percentile provision, 20 U.S.C. 7709(b)(2)(B)(i), conflicts with the statute. According to Zuni, the statute precludes the Secretary from considering the number of pupils served by each LEA in applying the 95th and 5th percentile exclusions, and thus bars the Secretary from excluding those LEAs at either end of the spectrum that account for 5% of the overall pupil population in the State. Zuni argued that the Secretary instead is required to apply one of two alternative methodologies: (i) eliminate 5% of the LEAs that are at either end of the spectrum, regardless of how many pupils are served by those LEAs; or (ii) calculate 95% of the per-pupil expenditures or revenues for the LEA with the highest per-pupil expenditures or revenues and eliminate any LEA whose per-pupil expendi-

tures or revenues is above that amount, and implement a corresponding exclusion of LEAs at the low end of the spectrum. See Pet. App. 15a. Either of those methodologies, if applied to New Mexico, would result in a remaining list of LEAs for which the disparity between the highest and lowest level of per-pupil expenditures or revenues would exceed 25%, such that New Mexico would fail to qualify as equalized. See *id.* at 15a n.7.

a. A panel of the court of appeals affirmed the Secretary's decision, rejecting petitioners' contention that the Secretary's methodology is precluded by the Impact Aid statute. Pet. App. 3a-33a. The panel reasoned that the "statute's ambiguity, coupled with the gap left by Congress regarding the specific means by which to implement the disparity test," required that deference be accorded to the Secretary's determination under *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837 (1984). Pet. App. 16a-17a. The panel concluded that the Secretary's interpretation is reasonable, explaining that it "supports the basic purpose of the percentile exclusion because it eliminates in a fair and effective manner any unusual or noncharacteristic per-pupil revenues or expenditures that may appear at the extremes of the range of LEAs in the state." *Id.* at 17a. The panel explained that Zuni's first suggested alternative approach of eliminating 5% of the LEAs at either end of the spectrum "would not further the goal of eliminating [the] unusual distribution of per-pupil expenditures in New Mexico," which "has predominately small LEAs, several of which rank near the top of per-pupil expenditures." *Ibid.*

Judge O'Brien dissented from the panel disposition. Pet. App. 22a-33a. In his view, the statute unambiguously required a slightly-modified version of Zuni's first

suggested alternate methodology, see *id.* at 24a, according to which New Mexico was not equalized.[2]

b. The court of appeals granted rehearing en banc and vacated the panel opinion. The en banc court affirmed the Secretary's decision by an equally divided court. Pet. App. 1a-2a. The court's per curiam opinion announced that result but contained no further explanation or reasoning. *Id.* at 2a.

ARGUMENT

The court of appeals' judgment affirming the Secretary's decision is correct and does not conflict with any decision of this Court or another court of appeals. Further review is unwarranted.

1. As petitioners acknowledge (Pet. 11), the validity of the Secretary's methodology for determining whether a State operates an equalized education funding program under 20 U.S.C. 7709 is governed by the two-step framework prescribed by *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837, 842-843 (1984). That approach calls for determining (i) whether the statute unambiguously re-

---

[2] As petitioner Zuni explained in the court of appeals (Zuni C.A. En Banc Repl. Br. 4), both Zuni's first suggested alternative approach and Judge O'Brien's approach ultimately call for eliminating 5% of the LEAs at either end of the spectrum of LEAs. Because New Mexico has 89 LEAs, the result under either approach would be to eliminate 5 LEAs (or 4.55 of the 89 LEAs) at either end of the spectrum. See Pet. App. 24a, 30a-33a. The lone difference between Zuni's first suggested alternative approach and Judge O'Brien's approach is that Judge O'Brien, as an intermediate step, calculated a value equaling the 5th% and 95th% of the range of per-pupil revenues, and then excluded those LEAs whose per-pupil revenues fell below or above those amounts, respectively. But the ultimate result of that approach was to exclude 5% of the LEAs at either end of the spectrum, consistent with the result under Zuni's first suggested alternative approach. Zuni C.A. En Banc Repl. Br. 4.

solves the interpretive question, and, if not, (ii) whether the agency's interpretation is a permissible one. *Ibid.* Where Congress leaves a gap for an agency to fill, courts are bound to respect the agency's choice so long as that choice is not "procedurally defective, arbitrary or capricious in substance, or manifestly contrary to the statute." *United States* v. *Mead Corp.*, 533 U.S. 218, 227 (2001) (citing *Chevron*, 467 U.S. at 844).

Petitioners contend (Pet. 11-15) that the Secretary's methodology fails under step one of the *Chevron* framework. See *Chevron*, 467 U.S. at 842-843. In petitioners' view, the language of 20 U.S.C. 7709(b)(2)(B)(i) unambiguously prescribes that, when applying the 95th% and 5th% exclusion requirement, the Secretary must exclude the 5% of *LEA*'s that fall at each end of the spectrum of LEAs (as ranked by per-pupil expenditures or revenues), instead of excluding those LEAs at each end of the spectrum that account for 5% of the total *pupil population*. Petitioners' argument lacks merit.

As an initial matter, petitioners' own position in the court of appeals demonstrates that the statute does not unambiguously prescribe a single methodology for applying the 95th% and 5th% exclusions—let alone the particular methodology petitioners now endorse. Petitioner Zuni argued in the court of appeals that, under 20 U.S.C. 7709(b)(2)(B)(i), either of two distinct methodologies would be consistent with the statute. See pp. 6-7, *supra*. And while petitioners now evidently support a third methodology set out by the panel dissent below (see Pet. 10)—which is a slight modification of the first alternative approach presented by Zuni below (see note 2, *supra*)—the second alternative endorsed by Zuni below is materially distinct from the approach petitioners now support. That second alternative (see pp. 6-7,

supra) does not entail excluding the 5% of *LEA*s at either end of the spectrum, but instead calls for calculating 95% of the highest per-pupil expenditures or revenues and eliminating *any* LEAs with a higher level of per-pupil expenditures or revenues (and performing a corresponding calculation at the low end of the spectrum), no matter how many LEAs might thereby be excluded.[3] That alternative, fully supported by petitioners below, thus directly conflicts with petitioners' current assertion that the statute unambiguously requires eliminating a particular "percentile[] of LEAs." Pet. 10, 14.

Even disregarding that petitioners endorsed two distinct methodologies below, there is no merit to petitioners' present contention that the statute unambiguously precludes the Secretary's approach and instead requires excluding the 5% of LEAs that fall at each end of the spectrum. The statute provides that, in assessing whether the disparity in per-pupil expenditures or revenues exceeds 25%, the Secretary shall "disregard [LEAs] with per-pupil expenditures or revenues above the 95th percentile or below the 5th percentile of such expenditures or revenues in the State." 20 U.S.C. 7709(b)(2)(B)(i). That language does not prescribe any specific approach for calculating the "95th percentile or * * * 5th percentile of such [per-pupil] expenditures or revenues in the State," or for determining which LEAs fall above or below those levels. As the Secretary explained in his decision in this case, "[a]lthough the im-

---

[3] The disparity calculation varies substantially depending on which of the two alternative methodologies are applied. Under the first alternative, the disparity between the per-pupil expenditures or revenues of the remaining set of LEAs would be 26.93%, whereas the disparity under the second approach would be 117.4%. See Pet. App. 15a n.7.

pact aid statute sets forth the parameters for calculating state public education expenditures or revenues under the disparity test, the statute does not contain a specific implementation of the disparity test; instead, Congress left that gap to be filled by regulation, which has been duly promulgated at an appendix to Subpart K of 34 CFR 222." Pet. App. 37a.

The Secretary's methodology calls initially for ranking LEAs in descending order according to per-pupil expenditures or revenues. The Secretary then excludes those LEAs with per-pupil expenditures that rank "above the 95th percentile or below the 5th percentile of [per-pupil] expenditures or revenues in the State," 20 U.S.C. 7709(b)(2)(B)(i), basing the percentile cut-offs on the total student enrollment in the State. Nothing in that approach conflicts with the statutory text. To the contrary, the Secretary's methodology restricts the application of the disparity test to those LEAs whose student populations represent the central 90% of per-pupil "expenditures or revenues in the State." *Ibid.* And as the court of appeals explained, basing the percentile cut-offs on total student enrollment "makes sense" because it "eliminates in a fair and effective manner any unusual or noncharacteristic per-pupil revenues or expenditures or that may appear at the extremes of the range of LEAs in the state." Pet. App. 17a.

Petitioners err in arguing (Pet. 10-11, 14) that the statute compels the Secretary to exclude a specific "percentile[] of LEAs" at either end of the spectrum, *i.e.*, the 5% of LEAs that fall at each end of the spectrum. As an initial matter, the statute, contrary to petitioner's argument, does not speak in terms of excluding percentiles "of LEAs." The statute instead calls for excluding LEAs whose per-pupil expenditures or revenues are

above the 95th percentile or below the 5th percentile "of [per-pupil] expenditures or revenues in the State." 20 U.S.C. 7709(b)(2)(B)(i). Petitioners' proposed methodology, moreover, always excludes the top and bottom 5% of LEAs, regardless of the proportion of the State's students or the amount of total expenditures or revenues encompassed by those LEAs. Accordingly, as the panel majority explained, in States like New Mexico with a substantial number of small LEAs ranking at the top of per-pupil expenditures, an approach that calls for excluding the top and bottom 5% of LEAs would eliminate only a few of those LEAs from the disparity calculation, even though LEAs that would remain at the top of the spectrum—and that thus would determine the top-end of the range of per-pupil expenditures or revenues when applying the 25% criterion—would account for a very small number of students and a very small share of overall expenditures or revenues. Pet. App. 17a.[4]

Indeed, that was precisely the reason that the Secretary originally rejected a methodology that would exclude a specific number (or percentile) of LEAs, without taking into account the number of students served by those LEAs:

> [B]asing an exclusion on numbers of districts would act to apply the disparity standard in an unfair and inconsistent manner among States. The purpose of

---

[4] It bears noting that the Secretary's methodology does not systematically favor an equalization finding as compared with petitioners' methodology. If a State faced the converse situation confronted by New Mexico, such that a small number of large LEAs would make up the top (or bottom) of the spectrum, the Secretary's methodology would result in a larger disparity between the highest and lowest non-excluded LEAs than would petitioners' methodology, and thus would more likely lead to a finding of non-equalization.

> the exclusion is to eliminate those anomalous characteristics of a distribution of expenditures. In States with a small number of large districts, an exclusion based on percentage of school districts might exclude from the measure of disparity a substantial percentage of the pupil population in those States. Conversely, in States with large numbers of small districts, such an approach might exclude only an insignificant fraction of the pupil population and would not exclude anomalous characteristics.

41 Fed. Reg. 26,324 (1976). By taking into account the number of students enrolled in an LEA, the Secretary's methodology "implements the statute in a manner that will give a more consistent result when applied to a variety of state school systems." Pet. App. 18a.[5]

Petitioners further err in arguing (Pet. 13-14) that the statutory amendments in 1994 precluded the Secretary from continuing to apply the previous methodology. As explained above, nothing in the statutory text expresses a rejection of the Secretary's methodology. To the contrary, the statute codified the fundamental features of the Secretary's approach, prescribing a 25% disparity test with a 5th% and 95th% exclusion requirement. And although the precise wording of the 5th% and 95th% exclusion requirement varied slightly from the Secretary's prior regulatory formulation, see p. 5, *supra*, there is no indication that that slight variation was intended to express rejection of the Secretary's approach. The Secretary's methodology, for those rea-

---

[5] The panel dissent acknowledged that the Secretary's "method of handling the 5th/95th percentile exclusion may be the superior one," but believed (erroneously) that the Secretary's method is precluded by the statute. Pet. App. 29a.

sons, is fully permissible according to the *Chevron* framework.[6]

2. The petition also does not warrant review because the effects of the Secretary's methodology are limited. Apart from New Mexico, only two additional States, Kansas and Alaska, claim to be equalized for purposes of applying 20 U.S.C. 7709. And apart from petitioners, no other LEA in any of those three States has objected to the Secretary's methodology. Additionally, the court of appeals below is the only court that has addressed the issue, and even that court's opinion—as an affirmace by an equally divided court—has no precedential effect. In the event that a similar challenge were raised by an Alaska LEA, another court of appeals would then have the opportunity to weigh in on the issue. For those reasons as well, there is no warrant for granting certiorari in this case.

---

[6] Although the core of petitioners' submission is that the Secretary's methodology fails at step one of the *Chevron* framework, see Pet. 10-12, petitioners also suggest that the Secretary's methodology fails as an antecedent matter even to implicate the *Chevron* framework because Congress did not delegate the requisite rulemaking authority to the Secretary, see Pet. 13-14 (citing, *inter alia*, *Gonzales* v. *Oregon*, 126 S. Ct. 904 (2006)). The latter argument ultimately collapses into the former one because petitioners' basis for asserting that Congress has failed to delegate authority to promulgate the regulatory methodology at issue is that the methodology is foreclosed by the statutory text. See Pet. 13. The statute, moreover, expressly calls for the Secretary to "mak[e] a determination" of whether a State should be certified as equalized. 20 U.S.C. 7709(b)(2)(B) & (c)(3)-(4). See also 20 U.S.C. 3474 ("The Secretary is authorized to prescribe such rules and regulations as the Secretary determines necessary or appropriate to administer and manage the functions of the Secretary or the Department.").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General
PETER D. KEISLER
Assistant Attorney General
ROBERT S. GREENSPAN
MICHAEL E. ROBINSON
Attorneys

JULY 2006